

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 May 2005

CASE NO.: 2004-LHC-1322
OWCP NO.: 10-1322

In the Matter of:

BIERRI BRILLA,
Claimant,

v.

BAY SHIPBUILDING CO.,
Employer,

and

SENTRY INSURANCE CO.,
Carrier.

Appearances: Michael B. Kulkoski, Esq.
For the Claimant

Gregory P. Sujack, Esq.
For the Employer

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq.* Claimant is seeking compensation and medical benefits for an alleged work-related injury to his right knee on January 21, 2003.

A formal hearing was held in this case on September 1, 2004 in Green Bay, Wisconsin at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulation. Claimant offered exhibits 1 through 5 which were admitted into evidence.¹ Employer offered exhibits 1 through 7 which were admitted into evidence. ALJX 1 through 4 were marked for identification and admitted into evidence without

¹ The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript.

objection. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. STIPULATIONS

The parties have stipulated (Tr. 5; ALJX 4) and I find that:

1. The parties are subject to the Act.
2. Claimant and Employer were in an employee-employer relationship at all relevant times.
3. Claimant alleges he sustained an injury arising out of and in the course of his employment on January 21, 2003.
4. A timely notice of injury was given by Claimant to Employer on January 21, 2003.
5. Claimant filed a timely claim for compensation on February 4, 2003.
6. Employer filed a timely first report of injury and notice of controversion on December 1, 2003 and February 4, 2003, respectively.
7. There has been voluntary payment of compensation by Employer as follows:

Temporary total disability from March 25, 2003 to October 28, 2003 – 20 weeks at \$407.16 per week for a total of \$8,163.20

Temporary partial disability from July 14, 2003 to August 24, 2003 – 6 weeks at \$199.96 per week for a total of \$1,199.76.

8. Claimant reached maximum medical improvement (“MMI”) on May 12, 2004 and has a permanent partial disability of 7.5%.
9. Claimant’s average weekly wage at the time of the injury was \$610.72, yielding a compensation rate of \$409.16.
10. Carrier paid a total of \$18,649.99 in medical expenses to Door County Memorial Rehabilitation, Bellin Hospital, Green Bay Orthopedics, and Dr. Grace.

II. ISSUES

The sole issue presented in this case is whether Claimant sustained an injury on January 21, 2003 to his right knee arising out of and in the course of his employment with Employer at its Sturgeon Bay, Wisconsin facility.

III. STATEMENT OF THE CASE

Testimonial and Non-Medical Evidence

Claimant testified that he was born December 27, 1949, was 54 years old at the time of the hearing, is married to Rose Brilla, completed two years of high school, is a life-long resident

of Sturgeon Bay, Wisconsin, and is now unemployed. Tr. 14-15. He is currently on medication (80 milligrams of Methadone daily and sometimes Darvocet), and the medication affects his ability to concentrate and recall dates. Tr. 15-16.

The last time Claimant worked was for a couple of days around April or May of 2004 but he could not perform the job they wanted him to do driving a grader to fix potholes because of his knee condition. Tr. 17-18. The title of the last position he held with Employer was maintenance worker and he also worked as a yard worker. Tr. 18. He began working as a steel worker on the day shift for Employer around April 20, 1970. Tr. 18-19. He switched to yard worker approximately eight to 10 years ago because of back problems and medical restrictions that prevented him from working in the field. Tr. 19.

Claimant's duties as a maintenance worker at the Sturgeon Bay facility included a variety of jobs fixing anything in the yard that needed repairing, *e.g.*, welding, cutting, configuring jigs, and helping mechanics. Tr. 20. The plant is approximately a half mile long and 1,000 feet deep. *Ibid.* He worked with about eight to 10 co-workers. Tr. 21.

Because of safety meetings held by Employer once a week, Claimant knew that he was obligated to report any job-related injuries to the company nurse, Cheryl Lengreder. Tr. 21-22. He never reviewed the records she kept with respect to reported injuries prior to this litigation. Tr. 22.

Claimant first started developing problems with his right knee after stepping into potholes at the shipyard, and he also slipped one time on some steps and jammed his knee and pelvis. Tr. 23. Employer bought a grader expressly for the purpose of repairing potholes in the shipyard. *Ibid.* Claimant stepped into more than one pothole at the shipyard, but the incident that sent him to the company nurse happened a few weeks before January 2003. Tr. 25. Cheryl gave him a neoprene sleeve to help stabilize his knee and also iced his knee. Tr. 25-26.

In January 2003, Claimant tried to climb up onto a forklift and his knee buckled. Tr. 26. Cheryl sent him to see Dr. Wescott Krieger since he was already seeing him for his back and neck problems. Tr. 27. Dr. Krieger took an x-ray of his knee and referred him to Dr. Grace, the orthopedic specialist who performed Claimant's arthroscopic surgery. Tr. 27-28.

The January 21, 2003 incident involving the forklift happened some time in the morning. Tr. 28. Claimant testified:

I got up on [the] forklift step to tell [Gary Combs, the operator] what I wanted him to pick up or do for me. And when I stepped up there to pull myself on the lift by the handles that is when the knee went sideways there or wherever it went, and I screamed down and said that is it. I told him I was sick and I can't take this no more.

Ibid. The platform that he stepped onto was about a foot to sixteen inches off the ground. Tr. 29. Claimant experienced severe pain in his right knee joint, and he subsequently told Cheryl that "it felt like when I step up my knee pulled apart, and then when I step back down something

feels like it goes inside and the bones come together on it, and something pinches in there, and that is what it felt like.” *Ibid.* He saw Cheryl that day and it was then that she referred him to Dr. Krieger. Tr. 30.

Claimant had never seen Dr. Grace before he was referred to him by Dr. Krieger. *Ibid.* Claimant subsequently had two surgical procedures on March 26, 2003, one on his right knee and another on his shoulder. *Ibid.* He told Dr. Grace that he “stepped in a pothole and then [he] stepped up on the forklift and that was the last straw.” Tr. 31. He told Dr. Grace that it was “weeks” before the forklift incident when he stepped into the pothole. Tr. 32.

Claimant’s surgery was performed by Dr. Grace at the Bellin Hospital in Green Bay, and he went through a period of physical therapy afterwards. Tr. 32. When the physical therapy did not help his knee get better, he had a second procedure done on the knee. *Ibid.* He did not recall in what month the second surgery occurred although he knew it was within the last year. Tr. 32-33.

Some time after Employer stopped paying compensation, they sent him to Dr. Aschliman for an IME. Tr. 34. Claimant believed the IME was after his second knee operation. Tr. 35. The examination took approximately 20 minutes, and Dr. Aschliman “sounded more like a lawyer to me than a doctor, and when I told him about the pothole and the forklift that was about the end of it.” Tr. 35. According to Claimant:

I told him I worked in the shipyard for all of my life, and he asked me if I ever had problems with my knee prior to that, and I said now I stepped in this pothole and it goes crazy on me and I can’t walk on that thing any more, and it jumps out of place every other day. I said I got up on this forklift and that was the straw that broke the camel’s back, and that is why I got the surgery. That is what I told him.

Tr. 36. Claimant’s wife was in the room with him at the examination. *Ibid.*

Claimant was subsequently examined by Dr. Clark. Tr. 36. Dr. Clark told him “the paperwork that we got somewhere along the line said that the forklift was what caused my injury, and that by getting up on the forklift it wouldn’t cause an injury like that.” Tr. 36-37. According to Claimant, he told Dr. Clark “right off the bat that Dr. Aschliman said it was the forklift, and I told him it wasn’t the forklift that caused . . . the injury. It was the pothole. The forklift was the last straw, and that is how I put it to him” Tr. 37.

Prior to appearing for the hearing, Claimant reviewed the company nurse’s records which reference an April 3, 2002 incident mentioning a knee injury from a pothole and the provision of a neoprene sleeve. Tr. 38. Claimant believes it was that incident he was attempting to describe to the doctors which preceded the January 21, 2003 forklift injury. Tr. 42. He did not miss any time from work between the April 3, 2002 incident and the January 21, 2003 injury due to his knee condition. Tr. 43.

On cross-examination, Claimant again testified that the incident on January 21, 2003 was “the straw that broke the camel’s back” and that, “[u]p until that point I was working with a sore

knee.” Tr. 44. He testified that subsequent to January 21, 2003, he saw Drs. Krieger, Grace, Aschliman, and Clark, and told them what had happened to him and about his prior conditions with his knee. Tr. 44-45. He further testified that he would go to the company nurse for medical attention whenever he needed treatment whether the condition was work-related or non work-related. Tr. 45-46.

According to a First Report of Injury (Form LS-202) dated April 16, 2002, Claimant reported on April 3, 2002 that “over the course of winter ‘several times’ he slipped when coming down icy steps of loading dock N. of 107 & knee has felt ‘unstable’ since like it ‘pops out of place & back again’ [with] certain motions.” EX 5 at 3. The nature of injury is described as “[k]nee strain, (R)” and medical attention by Wescott Krieger, M.D. was authorized. *Ibid.*

A handwritten note dated January 23, 2003 in Employer’s Kardex records maintained by the company nurse shows that Claimant complained of right knee soreness with going down stairs. With respect to the history of the injury, the note reflects:

Says on 1-21-03 he stepped onto running board of G. Comb’s forklift & felt sharp pain in (r) knee when mounted [with] weight on it. Did not fall or give way but felt as though it would.

EX 6 at 9. The next most recent notation in the company nurse’s records relating to complaints associated with Claimant’s right knee is an April 3, 2002 entry stating that Claimant complained that his right knee felt as though it was going to “pop out of place.” EX 6 at 12. The history of the injury was recorded as:

Happ[ened] “several times” over the course of the winter. Slipped when coming down icy loading dock steps N of 107. Knee has felt “unstable” since then & like it “pops” out of place & back again [with] certain motions.

Ibid.

According to a First Report of Injury (Form LS-202) dated February 4, 2003, Claimant was involved in an accident on January 21, 2003 at Employer’s Sturgeon Bay facility described as follows:

Man states he stepped onto running board of forklift & felt sharp pain in (R) knee when mounted with weight on it.

EX 5 at 1. The report notes that he was seen by Dr. Westcott Krieger and diagnosed with a bucket-handle tear of the meniscus of the right knee. *Ibid.*

According to an April 23, 2004 letter to Gordon L. Clark, M.D. from Andrea Flees, Claims Representative for Sentry Claims Service, she had obtained additional information relevant to this claim since Dr. Clark performed an IME on January 15, 2004. EX 7 at 3. The letter states, *inter alia*

Due to our denial [of the claim] the Department of Labor requested you perform a department IME on Mr. Brilla. When Mr. Brilla told the history of injury to you he indicated that he stepped into a pothole at work and twisted the right knee. He did not tell this story to anyone, including his treating doctor until the claim was denied. In your IME report you indicated that if Mr. Brilla's current depiction of events (steeping [sic] into a pothole and twisted the right knee is accepted as truthful), then he sustained a medial meniscal tear by direct cause on January 21, 2003. You also indicated that if his statements of stepping onto or off a forklift are accepted as truthful, the medial meniscal tear might not have occurred at that moment.

Ibid. Ms. Flees therefore asked Dr. Clark to address eight specific questions relating to the etiology and nature of Claimant's right knee condition. *Ibid.*

Medical Evidence

A treatment note from W. Krieger, M.D., dated February 3, 2003, reflects, in pertinent part, that Claimant was seen for complaints of "[right] knee pain/injury 3 wks. PTA. He states injury occurred climbing onto a fork lift. (Pt has [history] of injury to same knee). Intermittent stability present." EX 1 at 2. The same note reflects right knee instability during flexion and 1+ valgus laxity in the knee. EX 1 at 3. The assessment was cartilage tear of the right knee. *Ibid.* Claimant was referred to Dr. Grace for, *inter alia*, "probably bucket handle tear(s) menisci Rt. knee." EX 1 at 1.

James N. Grace, M.D., performed an orthopedic examination of Claimant on February 18, 2003. CX 3 at 1. The report of the examination notes

The right knee was injured on 1/21/03 when he got up from a forklift and he felt pain in the medial side of his right knee and has had discomfort in that knee since that time. He has never had any previous knee problems.

Ibid.

A follow-up note by Dr. Grace on February 25, 2003 notes that Claimant continued to have signs and symptoms consistent with medial meniscus tearing in the right knee, and that he had swelling, catching, popping, and pain with bending and twisting. CX 3 at 1. The same note states that x-rays of the right knee in the past have been normal. *Ibid.*

According to a history and physical examination taken by Dr. Grace at Bellin Health System on March 26, 2003:

[Claimant] . . . has right knee pain which was injured January 21, 2003, when he got off a forklift and felt a pain in his knee. He has had discomfort in his knee since that time. He has sharp catching and popping. Again, he has never had any previous knee problems. He clinically has a tear in the medial meniscus of his right knee.

CX 2 at 8. Dr. Grace's impression was "[w]ork-related right knee medial meniscus tearing." *Ibid.*

According to an operative/procedure report from Bellin Health System, Claimant was admitted March 26, 2003 for, *inter alia*, a right knee arthroscopy, partial medial meniscectomy. CX 2 at 6. The postoperative diagnosis was medial meniscus tear, right knee. *Ibid.*

Between March 28, 2003 and September 2, 2003, Claimant underwent physical therapy for, *inter alia*, his right knee at Door County Memorial Hospital Rehabilitation Services in Sturgeon Bay, Wisconsin. CX 4.

A treatment note of Dr. Grace dated July 14, 2003 notes that Claimant's right knee became sore when he returned to work and he was asked to walk long distances. CX 3 at 3. Dr. Grace recommended restrictions against walking more than 5 minutes and no squatting, kneeling, or stair climbing. *Ibid.*

A second operative/procedure report from Bellin Health System reflects that Claimant was admitted on September 17, 2003 for persistent right anterior knee pain. CX 2 at 11. The postoperative diagnosis was femoral trochlear articular cartilage lesion. *Ibid.*

Treatment notes of Dr. Grace dated October 24, 2003 and December 1, 2003 reflect that claimant was capable of sedentary work and then light/medium work for up to four hours, respectively. CX 3 at 4. A note dated January 7, 2004 shows that Claimant could work medium duty five hours per day but should avoid squatting and kneeling activities. *Ibid.* According to a May 12, 2004 note, Claimant "has plateaued in his recovery." *Ibid.* The same note further reflects:

He could do sedentary work, but I don't think any significant standing, squatting, kneeling or stair climbing would be at all reasonable. He may require knee arthroplasty at some time in the future and he will have persistent problems which will require intermittent orthopedic evaluation and treatment.

Ibid.

Claimant was seen by Dr. Mark Aschliman for an orthopedic examination on October 27, 2003. EX 2. The examination report reflects that he was examined for, *inter alia*, an injury to his right knee on January 21, 2003. EX 2 at 2. According to the report:

On 01/21/03, Mr. Brilla was in the workplace when he was about to get on a forklift. In the process of doing so, without particular accident or injury, he noted acute right knee discomfort. This, too, he reported to his employer and sought medical care initially on 02/03/03 with his primary care physician.

Ibid. Claimant further told Dr. Aschliman “that he has had a history of intermittent right knee symptoms . . . [some of which caused] fairly significant right knee discomfort that would wax and wane.” *Ibid.* Regarding the etiology of the knee condition, Dr. Aschliman wrote:

With regard to the right knee, Mr. Brilla has a condition of femoral chondromalacia, as well as a medial meniscus tear, both of which have been addressed surgically. These conditions cannot reasonably be related to the work activities of the examinee. Mr. Brilla was simply getting either on or off of a forklift and sustained no twisting injury, no fall and no traumatic occurrence when he developed some right knee pain. He, indeed, had a history of intermittent right knee discomfort similar to that noted in the past.

Mr. Brilla had simply a manifestation of an ongoing process in the right knee that manifested on 01/21/03 without contribution from his work activities.

All treatment has been appropriate. Any and all treatment with regard to the knee, in my opinion, may be considered non-industrial in its origin and necessity. There was simply no industrial injury that caused the problem, rather an occurrence that had been ongoing and intermittent that manifested once again while in the workplace without significant contribution from workplace activities.

EX 2 at 6.

Claimant was seen for an IME on January 14, 2004 by Gordon L. Clark, M.D. with respect to his January 21, 2003 injury to the right knee. EX 4. Dr. Clark’s report of the examination notes that he reviewed reports by Drs. Grace and Aschliman, and that he obtained a history from Claimant with respect to his knee injury. EX 4 at 2-3. According to Dr. Clark:

Mr. Brilla states that on January 21, 2003, he stepped into a pothole at work and twisted the right knee. This story differs considerably from the history that was presented to different evaluators and to Dr. Grace in the medical record. In that record, Mr. Brilla was stepping onto or stepping off of a forklift. No mention is made of stepping into a pothole and twisting the knee.

EX 4 at 3. In response to an interrogatory concerning the relationship of any findings to Claimant’s January 21, 2003 injury, Dr. Clark wrote:

It has been suggested in a previous independent medical examination that Mr. Brilla had a preexisting symptomatic condition in the knee. Mr. Brilla denies previous symptoms or previous injury to the right knee. Dr. Grace found no evidence of preexisting degenerative changes at the time of the first surgical procedure on March 29, 2003. His only findings at that time were a torn medial meniscus.

Therefore, taking all of this information into account, if Mr. Brilla’s current depiction of events (that is, stepping into a pothole and twisting the right knee is

accepted as truthful), then he sustained a medial meniscal tear by direct cause on January 21, 2003. However, if his statements of stepping onto or off of a forklift are accepted as truthful, then the medial meniscal tear may not have occurred at that moment.

A meniscal tear was, in that case, likely present prior to January 21, 2003, but simply temporarily aggravated by the event of stepping onto or off of a forklift. Only the finder of fact is in a position to determine the truthfulness, or lack thereof, of Mr. Brilla's statements since they differ so significantly. It may well be that Mr. Brilla has altered his description of the injury following the previous independent medical examination in order to establish a more convincing mechanism of injury.

EX 4 at 8.

On March 10, 2004, Dr. Aschliman authored an addendum to his prior report of examination based on his review of the IME performed by Dr. Clark on January 14, 2004. EX 3. Dr. Aschliman noted his agreement with Dr. Clark's "opinion that the claimant may be modifying the history to create an industrial injury." EX 3 at 2. He wrote:

When seen in this office, the claimant never mentioned stepping into a pothole. Stepping into a pothole may have caused a problem, but there is no indication from the record or from the information provided in this office from the claimant that he did step into a pothole. He indicated simply that he was getting onto a forklift when he noted some right knee discomfort on 01/21/03.

It is my opinion that the claimant had a preexisting meniscal tear and, at the very most, had a transient temporary aggravation of the condition, from which he would have recovered within a few minutes.

The need for intervention, which was appropriately provided by Dr. Grace, related to a preexisting condition of the examinee.

I do not believe that stepping onto the forklift caused the meniscal tear. I do not believe that the claimant stepped into a pothole. This was an evolutionary statement made, I believe, as Dr. Gorden Clark pointed out, to establish an industrial etiology to the condition.

EX 3 at 2-3.

On May 3, 2004, Dr. Clark supplemented his report of April 29, 2004 regarding Claimant based on his review of additional evidence. EX 7. The supplemental report notes, in relevant part:

Based on reasonable medical probability, noting a significant change in the description of injury, it is my opinion that the claimant's current condition is not as a result of stepping on or off a forklift.

EX 7 at 1. Dr. Clark further stated that it was "extremely unlikely" that stepping onto a forklift would cause a meniscal tear and that Claimant's activities in that regard most likely caused a temporary aggravation of an already present meniscal tear. EX 7 at 2. When asked if he believed Claimant's report of injury that he stepped into a pothole, Dr. Clark wrote:

Based on the fact that he told other examiners and healthcare providers an entirely different story repeatedly, it is my opinion that his report of injury to me was not in fact accurate, and he in fact did not step into a pothole.

Ibid. Dr. Clark agreed with Dr. Aschliman's conclusion that Claimant's statement regarding stepping into a pothole "was an evolutionary statement made to establish an industrial etiology to the condition." *Ibid.* He further concluded that if Claimant sustained an aggravation to his right meniscus tear on January 21, 2002, no treatment would be necessary for the temporary aggravation and "[a]ny treatment directed at the meniscal tear would be directed . . . at a preexisting condition." *Ibid.*

On July 29, 2004, Dr. Grace wrote that he believed Claimant had a 7.5% permanent partial disability of the right knee due to his work-related injury of January 21, 2003. CX 5.

IV. DISCUSSION

Causation

The LHWCA provides a presumption that a claim comes within its provisions. *See* 33 U.S.C. §920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) he sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). The claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused the alleged harm; rather, the claimant must show that working conditions existed which could have caused the harm. *See generally U.S. Indus.*, 455 U.S. at 615. A claimant's credible subjective complaints of pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Dir., OWCP*, 681 F.2d 359 (5th Cir. 1982).

Claimant alleges that he injured his right knee on January 21, 2002 when he was stepping onto the platform of a forklift which was being operated by Gary Combs. Tr. 28. Claimant testified that as he was stepping onto the platform, which was approximately 12 to 16 inches off the ground, his knee "went sideways" and he experienced severe pain in his knee. Tr. 28-29. He

further testified that he subsequently reported the injury to Cheryl Lengreder, the company nurse. Tr. 29.

Claimant clearly suffered pain in his right knee on January 21, 2002 during the course of his work activities. The pain was of sufficient concern that he reported the incident to Cheryl Lengreder two days later on January 23rd. EX 6 at 9. His account of the incident is consistent with Ms. Lengreder's handwritten notes, and is credible. Furthermore, the evidence of record, including Claimant's testimony, establishes that his right knee was unstable as a result of prior injuries reported to Employer on April 3, 2002. EX 6 at 12. Dr. Krieger, Claimant's treating physician, similarly noted that Claimant had a history of injury to the right knee when he treated Claimant on February 3, 2003. EX 1 at 2. Given this prior history of injury to, and instability of, the knee, it is entirely possible that, as Claimant asserts, he experienced pain during the course of his employment as he was stepping onto the forklift operated by Gary Combs. Claimant has thus presented sufficient evidence to establish a *prima facie* case and invoke the Section 20(a) presumption.

Once a claimant establishes a *prima facie* case, the employer must present substantial evidence proving the absence of, or severing the connection between, such harm and employment in order to rebut the presumption. *Parsons Corp. of California v. Dir.*, OWCP, 619 F.2d 38 (9th Cir. 1980); *Butler v. Dist. Parking Mgmt. Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989). Substantial evidence is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969).

In this case, Employer relies primarily on the opinions of Drs. Aschliman and Clark as evidence rebutting the Section 20(a) presumption.

Dr. Aschliman examined Claimant on October 27, 2003 and concluded that his right knee condition "cannot reasonably be related to the work activities of the examinee." EX 2 at 6. According to Dr. Aschliman:

Mr. Brilla had simply a manifestation of an ongoing process in the right knee that manifested on 01/21/03 without contribution from his work activities.

....

There was simply no industrial injury that caused the problem, rather an occurrence that had been ongoing and intermittent that manifested once again while in the workplace without significant contribution from workplace activities.

Ibid. On March 10, 2004, in an addendum to his report, Dr. Aschliman similarly wrote:

It is my opinion that the claimant had a preexisting meniscal tear and, at the very most, had a transient temporary aggravation of the condition, from which he would have recovered within a few minutes.

EX 3 at 3.

Dr. Clark initially examined Claimant on January 14, 2004 and noted that Claimant told him he stepped into a pothole and twisted his right knee on January 21, 2003. EX 4 at 3. He stated that, if Mr. Brilla's statements regarding stepping into a pothole were true, then it was his opinion that he sustained a medial meniscal tear at that time. EX 4 at 8. Dr. Clark further stated, however, that if Claimant was simply stepping onto a forklift, as was reported in other medical records he had reviewed, "then the medial meniscal tear may not have occurred at that moment." *Ibid.* On May 3, 2004, Dr. Clark offered a more definitive opinion on causation in a supplemental report when he wrote that "claimant's current [right knee] condition is not as a result of stepping on or off a forklift." EX 7 at 1.

The opinions of Drs. Clark and Aschliman are clearly "the kind of evidence a reasonable mind might accept as adequate to support a conclusion." *Travelers Ins. Co. v. Belair, supra.* I therefore find that Employer has rebutted the Section 20(a) presumption.

Once the Section 20(a) presumption is rebutted, it falls out of the case and the judge must then weigh all the evidence and resolve the case based on the record as a whole. *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987); *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The burden of persuasion continues to rest on the claimant under section 7(c) of the Administrative Procedure Act. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 120 S. Ct. 1239 (2000) citing *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

As noted above, Claimant asserts that he sustained an injury to his right knee when he stepped onto a forklift on January 21, 2005. He also asserts, and Employer agrees, that there is evidence of a prior injury to the right knee in April 2002, but Claimant has expressly eschewed entitlement to any benefits as a result of that injury. Tr. 41. Indeed, in light of his failure to file a claim for compensation within one year of the April 2002 injury, Claimant clearly is now barred from seeking compensation for such injury. 33 U.S.C. § 913(a).

Employer argues that while Claimant may have experienced some transient knee pain at the time of the January 21, 2005 incident, it was nothing more than a symptomatic manifestation of his preexisting condition which was not aggravated in any way by his work-related activities. Based on the opinions of Drs. Aschliman and Clark, I agree.

Dr. Aschliman examined Claimant and reviewed the available medical evidence when he conducted his IME. He clearly and unequivocally concluded that Claimant's femoral chondromalacia and medial meniscus tear of the right knee were neither caused nor aggravated by the January 21, 2005 incident with the forklift. EX 2 at 6. He concluded that "[t]here was simply no industrial injury that caused the problem, rather an occurrence that had been ongoing and intermittent that manifested once again while in the workplace without significant contribution from workplace activities." *Ibid.* At most, according to Dr. Aschliman, Claimant experienced a transient temporary aggravation of the condition, from which he would have recovered within a few minutes." EX 3 at 3. He further stated that the need for surgical

intervention related to Claimant's preexisting knee condition, not the January 21, 2003 incident. *Ibid.*

Just as clearly, Dr. Clark opined that: stepping onto or off of a forklift would not have caused Claimant's torn meniscus; the meniscal tear in the right knee was likely present before January 21, 2003; and Claimant's activities pertaining to the forklift incident "simply temporarily aggravated" his knee condition. EX 4 at 8; EX 7 at 1. He further concluded that if Claimant sustained an aggravation to his right meniscus tear on January 21, 2002, no treatment would be necessary for the temporary aggravation and "[a]ny treatment directed at the meniscal tear would be directed . . . at a preexisting condition." EX 7 at 2.

Since there is no other credible medical evidence of record on the issues of causation and aggravation of Claimant's right knee condition, I find that he has failed to prove by a preponderance of the evidence that he sustained an injury on January 21, 2003 to his right knee arising out of and in the course of his employment with Employer at its Sturgeon Bay, Wisconsin facility.

ORDER

IT IS HEREBY ORDERED that the claim of Bierra J. Brilla for benefits under the Longshore and Harbor Workers' Compensation Act as a result of an injury incurred while working for Bay Shipbuilding Corporation is DENIED.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.